IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12034 of 2005
With
SPECIAL CIVIL APPLICATION No. 12036 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ASHUTOSH LEASE FINANCING LTD. THR' MANAGING DIRECTOR - Petitioner(s)

Versus

BHAGYODAY COOPERATIVE BANK LTDTHR' MANAGER & 8 - Respondent(s)

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Appearance :

MR YATIN SONI for Petitioner(s) : 1 - 8.
MR UI VYAS for Respondent(s) : 1,
RULE SERVED BY DS for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 13/10/2005

ORAL JUDGMENT

1. In both the aforesaid matters, the order passed by Gujarat State Co-operative Tribunal, Ahmedabad in

Revision Application Nos. 102/2005 and 112/2005 dated 02/05/2005 is under challenge.

2. Similarly, order dated 09/03/2005 passed by the Board of Nominees, in Summary Arbitration Suit No. 567/2004 is also challenged. The Board of Nominees granted leave to defend the suit on condition to deposit 25% of the suit amount. It is prayed by the petitioner that they may be given unconditional leave to defend the suit.

3. It is contended by the learned Counsel appearing for the petitioner that the Respondent had instituted summary suit against the present petitioner. The Board of Nominees, Ahmedabad had already granted stay for the transfer of properties in question vide order dated 01/04/2004 (Annexure – D to the memo of the petition). Vide very order attachment before judgment / order has also been passed by the Board of Nominees, Ahmedabad for the vehicles in question and therefore, while granting leave to defend, the condition imposed by the Board of Nominees, vide order dated 09/03/2005 for deposit of 25% of the suit amount is uncalled for and unwarranted and deserves to be quashed and set aside. (Annexure – G to

the memo of the petition).

4. It is also contended by the learned Counsel appearing for the petitioner that all the three remedies under Order XXXVII, Order XXXVIII and Order XXXIX of the Code of Civil Procedure, 1907 (hereinafter referred as CPC for short) cannot be resorted simultaneously by the Respondent-Bank. There is already an order of injunction in favour of the Respondent-Bank under Order 39. Similarly, there is an order of attachment before judgment of the impugned properties under Order 38 in favour of the Respondent – Bank and therefore, while deciding the leave to defend under Order 37, the condition imposed by the Board of Nominees, and which is confirmed by Co-operative Tribunal is dehors the law. Therefore, it deserves to be quashed and set aside. It is also contended by the learned Counsel appearing for the petitioner that there is enough protection with the petitioner. The learned Counsel appearing for the petitioner has relied upon several decisions which are as under:

(i) 2000(4) GLR 408
(ii) 1994(2) GLR 1686
(iii)1983(1) GLR 700
(iv) AIR 1977 SC 577
(v) 1970 GLR 140

It is also pointed out by the learned Counsel appearing for the petitioner that the sum claimed by the respondent is highly disputed amount, rate of interest as per petitioner – Bank is very high. The amount is not liquidated amount and therefore, unconditional leave to defend ought to have been granted by the Courts below.

5. I have heard learned Counsel appearing for the Respondent who has submitted that the present petitioner had given “Kabulat pursis” (page No. 61 and Page No. 64) before the Board of Nominees, whereby it has been admitted by the petitioner that they are liable to make payment of Rs. 33,85,467/- (Thirty Three Lakhs Eighty Five Thousand Four Hundred Sixty Seven only) and interest at the rate of 10% from 1st April, 2004. This pursis was given on 15th December, 2004 (page 61 of the memo of the petition). The claim of the Respondent is for Rs. 52,77,414/- (Rupees Fifty Two Lakhs Seventy Seven Thousand Four Hundred and Fourteen only). While granting conditional leave 25% of the suit amount has been directed to be deposited. This 25% comes to approximately Rs. 13 lakhs. Thus, the condition upon which the leave to defend has been granted is not unreasonable, looking to the “Kabulat pursis” given by the petitioner before the

Board of Nominees. It is also submitted by the learned Counsel appearing for the Respondent that there is no ban or bar for taking recourse under Order XXXVII, Order XXXVIII and Order XXXIX of the Code of Civil Procedure, 1907. In a given case, looking to the facts and circumstances of the case, the Competent Court has all power, jurisdiction and authority to pass order under Order XXXVII, Order XXXVIII and Order XXXIX of the C.P.C. In the present case, the goods are vehicles. The value of the vehicles always reduces year by year and therefore, the Court has passed the order of injunction, as well as attachment before judgment and looking to the undisputed amount, the conditional leave to defend order has been passed. The learned Counsel for the Respondent-Bank has relied upon the following judgments:

(i) AIR 2005 Guj 37
(ii) 2003(4) GLR 3547
(iii)2002(1) JT 287

6. Looking to the facts of the case, and documents on record, various judicial pronouncements and upon hearing Counsels for both the sides, I see no reason to entertain the present petitions, especially for the following facts and reasons:

(i) The Respondent-Bank has filed Lavad Suit against the petitioners for sum of approximately Rs. 52 lakhs. The amount has been received by the petitioner and the sum has not been repaid to the Respondent-Bank. This has been admitted position of fact. The only contention raised by the petitioner is that the Board of Nominees, has already passed an order on 1st April, 2004 whereby the injunction has already been granted against the sale, lease or otherwise transfer of vehicles in question. In the very order dated 1st April 2004 (Annexure - D to the memo of the petition) the Board of Nominees, has also passed an order for attachment before judgment. Thus, it is contended by the learned Counsel appearing for the petitioner that once this order has been passed, unconditional leave to defend, ought to have been granted. This contention has not been accepted looking to the nature of transaction and nature of goods. Order of injunction can be passed and order of attachment before judgment can

also be passed simultaneously. When the value of goods deteriorate, month by month and year by year, which makes the execution of decree difficult and when certain sum of claim is not disputed, the Board of Nominees has all power, jurisdiction and authority to impose the condition while granting leave to defend.

(ii) In the facts of the present Case, the properties which is attached before judgment are the vehicles. It appears from the petition that petitioners have no objection for the order of injunction or attachment before the judgment but they have grievance about the conditional leave to defend. As per pursis given by the petitioner dated 15th December, 2004 (Annexure F collectively at page no. 61), the petitioners have admitted the fact that they have to pay Rs. 33,85, 467/-(Thirty Three Lakhs Eighty Five Thousand Four Hundred Sixty Seven only) with interest at the rate of 10% per annum with effect from

1st April, 2004. Even the mode of payment has been mentioned by the petitioners in the aforesaid pursis given by them. As per Order XXXVII Rule 3(5), as per second proviso thereof, where the part of amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless, the amount admitted to be due is deposited by the defendant in the Court. In view of the provision i.e. Rule 3(5) of Order XXXVII, order passed by the Board of Nominees dated 9th March, 2005 is absolutely true, correct and in consonance with the facts of the case. Similarly, order passed by the Tribunal dated 2nd May, 2005 in Revision Application confirming the order passed by Board of Nominees in the Revision Application preferred by the petitioner is also true and correct. Various other contentious issues have been raised by the learned Counsel appearing for the petitioner as to power and jurisdiction of the Bank to give loan etc. It is not

necessary for this Court to enter into the adjudication of these pleas of the petitioners at this stage of leave to defend. Once the condition imposed by the Board of Nominees for depositing of amount is fulfilled, thereafter, only on merits, the case can be heard. Merit cannot be adjudicated, first, unless condition referred in leave to defend, is fulfilled.

(iii) It is also contended by the learned Counsel appearing for the petitioner that neither Board of nominees nor the Tribunal dealt with all the contentions which are referred to by the petitioners and therefore, orders are non-speaking orders. This contention is not accepted by this Court. There are enough cogent and convincing reasons referred of in the orders passed by Board of Nominees as well as by the Tribunal for grant of conditional leave to defend and confirmation thereof. In fact, the order of leave to defend ought not necessarily be a speaking order.

Detailed reasoning at this stage is not required to be given. It has been held by this Court in a case of ***United Industries and others v. M/s. Dalwadi and Co. and another reported in AIR 1969 SC 18***, especially paragraph No. 4 reads as under:

> *"4. That takes us to the second contention urged by Mr. S.K.Jhaveri on behalf of the petitioner. He contended that the order granting conditional leave to defend the suit was bad inasmuch as it did not disclose reasons on which it was based. The argument was that since the order was a judicial order made by the learned Judge in the exercise of his judicial discretion, it was necessary that it should set out the reasons which prevailed with the learned Judge in exercising his discretion in the manner he did. But this argument stands concluded by a decision given by a Division Bench of this Court on 8th February, 1967 in Civil Revn. Appln. No. 1196 of 1966, Vijay Kumar K. Shah v. Firm of Pari Nareshchandra Jayantilal (AIR 1968 Guj. 247). The Division Bench pointed out in this case that it is not necessary that an order granting or refusing leave to defend the suit filed under the summary procedure must contain reasons in support of the order and the absence of reasons does not vitiate the order. Mr. S.K.Jhaveri, however pointed out that this decision can no longer be regarded as good law in view of a recent decision of the Supreme Court in Bhagat Raja v. Union of India, AIR 1967 SC 1606. We have carefully gone through this decision of the Supreme Court but we do not think there is*

anything in it which overrules what the Division Bench said in Civil Revn. Appln. No. 1196 of 1966 (AIR 1968 Gu. 247). The decision of the Supreme Court was concerned with a case where the Central Government was functioning as a tribunal hearing a revision application against the order of the State Government rejecting an application for a mining lease under Section 19 of the Mines and Minerals (Regulation and Development) Act, 1957 read with the amended rule 55 of the Mineral Concession Rules, 1960 and the question was whether the Central Government while making an order rejecting the revision application was bound to give reasons in support of the order. The Supreme Court held that the Central Government ought to have given reasons and since no reasons were given, the order was liable to be quashed and set aside. The decision of the Supreme Court was expressly and in so many terms confined only to tribunals exercising judicial or quasi-judicial powers and reference to Courts of law was deliberately avoided while stating or discussing the principles on which the decision was based. We cannot, therefore, read this decision of the Supreme Court as laying down that wherever an order is made by a Court of law it must necessarily be accompanied by a judgment giving reasons in support of it. The question whether an order made by a Court of law is required to be supported by a judgment setting our reasons would be governed by the Code of Civil Procedure. So far as an order granting or refusing leave to defend in a summary suit is concerned, there is no provision in the Code of Civil Procedure which requires that such an order mus contain reasons for the making of the order. As pointed out by the Division Bench of this Court in

Civil Rev. Appln. No. 1196 of 1966 (AIR 1968 Gu. 247) : "We do not find anything in Rules 142 to 148A which requires that the order must disclose the reasons in support of it or that it must be accompanied by a judgment giving the grounds in support of the order. There is also no provision in the body of the Code or in the rules in the First Schedule either as originally enacted or as amended by the High Court from time to time which requires that an order granting or refusing leave to defend a suit filed under the summary procedure must set out the reasons for the making of the order". We are, therefore, unable to accede to the contention of Mr. S.K.Jhaveri that the decision of this Court in Civil Revn. Appln. No. 1196 of 1966 (AIR 1968 Guj. 247) holding that an order granting or refusing leave to defend a suit filed under the summary procedure does not require to be accompanied by a judgment giving reasons in support of the order is overruled by the decision of the Supreme Court in Bhagat Raja's case AIR 1967 SC 1606(supra). The validity of the order impugned in the present revision application cannot, therefore, be challenged on this ground."

(Emphasis supplied)

Thus, in view of this aforesaid judgment, the order passed by the Board of Nominees and the Tribunal are true and correct and requires no interference by this Court.

(iv) As per Rule 41-A of the Gujarat Co-

operative Societies Rules, 1965, thirty three and half percent of the amount of claim of plaintiff can be ordered to be deposited. Rule 41-A of the Rules, 1965 reads as under:

"41-A Summary procedure for deciding disputes:-

(1) In dispute referred to in sub-sec. (4) of Sec. 99 the disputant shall in addition to the normal avernment in Form "K" make the following avernment namely:-

(a) that the claim of the disputant is for recovery of liquidated sum of money only and no other relief beyond the scopes of this rule is claimed in the disputed;

(b) that the disputant believes that there is no valid or bonafide defence to his claim;

(2)(i) Within ten days from the service of a notice calling upon the opponent to obtain leave from the Registrar to appear and defend the claim, the opponent or such of the opponents as are interested in defending the claim shall apply to the Registrar by an affidavit or a declaration for the leave setting out the facts on which he relies, and what triable issues are likely to arise. The opponent shall in such application disclose all the documents supporting his contention and as far as possible attach copies of such documents which he considers important from his point of view. A copy of such application shall be served on the disputant and he shall have a right to file a rejoinder in the

form of an affidavit or declaration and place before the deciding authority. Such materials as in his opinion supports his contentions.

(ii) The Registrar, on reading the affidavits and declarations and on hearing the parties and their pleadings and considering the documents relied on and produced by them, may pass an award or grants leaved to defend to such of the opponents, subject to the conditioned that the opponent shall deposit thirty three and half percent amount of the claim of the dispute or such less amount as may be fixed by the Registrar after taking into consideration the circumstance and facts of the disputes."

(emphasis supplied)

As stated above and looking to the pursis filed by the petitioner, the amount ordered to be deposited is lesser than what is admitted. A sum of undisputed amount as per pursis is Rs. 33,85,467/-, whereas while granting conditional leave to defend, approximately Rs. 13 lakhs are to be deposited by the petitioners, out of suit amount which is approximately Rs. 52,77,414/-.

(v) Looking to the provisions of the Gujarat

Co-operative Societies Act, 1961 to be read with Rules 1965 to be read with Code of Civil Procedure, 1907, there is no ban or bar against the Board of Nominees, that once order of injunction is passed under Order XXXIX, no Order of attachment before judgment under Order XXXVIII can be passed. Simultaneously, there is no ban or bar that once the order of injunction is given under Order XXXIX and order of attachment before judgment is passed under Order XXXVIII of C.P.C. no order under Order XXXVII can be passed so that other side has to deposit the amount as conditional leave to defend. All that depends upon the facts and circumstances of the case. Looking to the nature of transaction, and looking to the goods in question, and looking to the undisputed amount as per “Kabulat pursis”, the Court has all jurisdiction and authority to pass orders under Order XXXVII, Order XXXVIII and Order XXXIX of the Code of Civil Procedure, so that if the decree is passed in favour of plaintiff,

the same can be secured by the plaintiff. The suit has not been filed for getting nothing after decree is obtained in favour of plaintiff. Looking to the facts if it is warranted to pass an order of injunction which prohibits the original defendant from transfer of properties in question, such order ought to be passed to by the Courts below, so that decree can be executed. If stay passed in favour of the plaintiff for the properties whose value gets deteriorated month by month and year by year, conditional leave to defend can also be passed.

7. It is also submitted by the learned Counsel for the petitioner that there are number of triable issues involved in the suit and therefore, no conditional leave to defend ought to have been granted. The rate of interest applied by the Respondent-Bank was too high and was in violation of the guidelines given by the Reserve Bank of India. Similarly, it is also contended by the learned Counsel for the petitioner that the Respondent-Bank has no power to grant loan to the petitioner for the

purchase of vehicles and therefore, also because of this contentious issues unconditional leave to defend ought to have been granted. There is no substance in these arguments advanced by the petitioner for the reason that there is already a pursis referring to the undisputed amount (at Page No. 61 and Page No.64). Even mode of payment has also been referred to by the petitioner and therefore, whenever there is undisputed amount by the original defendant, the Court ought to pass order of deposit of the undisputed amount as per second proviso to Rule 3(5) of Order XXXVII of C.P.C. After getting loan from the Respondent – Bank, the petitioner is challenging the validity of the Respondent-Bank as to granting of loan. This plea raised by the petitioner is not triable issue at all. The discretion used by the Board of Nominees for imposing condition of 25% of the deposit is absolutely justifiable, true and correct and in consonance with the facts of law.

8. In fact, the order passed on 1st April, 2004 by the Board of Nominees whereby the injunction has been granted for the sale, mortgage, or otherwise transfer of the vehicles and attachment before judgment are of the vehicles in question, not belonging to the petitioners.

The petitioners property has never been attached at all nor any order has been passed for the properties of the petitioners under Order XXXIX of C.P.C. The vehicles in question do not belong to the petitioner and therefore, conditional leave to defend order passed by the Board of Nominees in view of the aforesaid provisions affects the petitioner, directly, for the first time. Therefore, the contention raised by the petitioner, that in addition to an order of injunction and order of attachment before judgment, conditional leave granted by the Board of Nominees ought not have been passed, is not accepted by this Court. There is no order against the petitioners under Order XXXIX nor under Order XXXVIII of C.P.C. On the contrary, the petitioners have admitted the sum of Rs. 35 lakhs to be paid to the Respondent-Bank with interest at the rate of 10% whereas the conditional leave to defend imposes the condition to deposit 25% of the suit amount which comes to only Rs. 13 lakhs. Thus, the discretion used by the Court below, looking to the facts of the case, requires no interference by this Court, in exercise of the powers conferred upon this Court under Articles 226 and 227 of the Constitution of India.

9. As a cumulative effect of the aforesaid facts and

circumstances of the case and reasons and judicial pronouncements, the conditional leave to defend order passed by the Board of Nominees, which is confirmed by the Tribunal, is true and correct and requires no interference by this Court. Petitions, therefore, fail. In both the Special Civil Applications, Rule is discharged. Interim relief granted, if any, stands vacated. Direct service permitted.

10. Learned Counsel for the petitioner prays for stay of this order. Looking to the facts of the case and reasons stated hereinabove, prayer of the petitioner for stay of this order is not accepted by this Court.

[D.N.PATEL, J.]

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